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CHARLES ELMORE CROPLEY

No. 352

In the Supreme Court of the United States

OCTOBER TERM, 1930

V. LOEWERS GAMBRINUS BREWERY CO., PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

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MEMORANDUM FOR RESPONDENT

The respondent does not oppose the petition, but suggests that the review be limited to the question whether the petitioner is entitled to any deduction for *obsolescence* of its tangible property in the taxable years 1918 and 1919 under Section 234 (a)(7) of the Revenue Act of 1918, which allows as a deduction "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." Nowhere in the record does it appear that the petitioner made a claim for the deduction of a loss under Section 234 (a)(4) of the Revenue Act of 1918, its claim having been confined to the

obsolescence deduction. The petitioner's claim for refund filed with the Commissioner of Internal Revenue and its complaint filed in the District Court both alleged error in the disallowance of deductions for obsolescence. (R. 37–39, 18.) The decision of the District Court in favor of the petitioner was based upon the failure to allow the obsolescence deduction (R. 41), and the opinion of the Circuit Court of Appeals is addressed solely to such claimed deduction. (R. 311–312.)

As thus limited, the questions involved are substantially the same as those now before this Court in *Lucas* v. *Niagara Falls Brewing Co.*, No. 61, certiorari granted April 28, 1930. The decision of the Circuit Court of Appeals for the Second Circuit in the *Niagara Falls case* has been overruled by its decision in the instant case, which followed the controlling principle laid down by this Court in *Clarke* v. *Haberle Brewing Co.*, 280 U. S. 384.

The respondent believes that the decision of the Circuit Court of Appeals in the instant case is correct, and, further, that even if obsolescence deductions are allowable for tangible property employed in a business extinguished by prohibition legislation, such a deduction may not be allowed under the facts in this case. But in order to save the petitioner's rights pending the decision of this Court in the *Niagara Falls Brewing Co. case, supra,* and *Lucas* v. *National Industrial Alcohol Co.*, No. 109, certiorari granted June 2, 1930, the respondent sees no reason to oppose the issuance of a writ of

certiorari, provided the review is limited to the question of obsolescence as distinguished from loss deductions.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
J. LOUIS MONARCH,
NORMAN D. KELLER,
Special Assistants to the Attorney General.

SEPTEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930